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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 616.

JOHN HILL, JR., ET AL., APPELLANTS,

vs.

HENRY C. WALLACE, SECRETARY OF AGRICULTURE, ET AL.

REPLY BRIEF.

HENRY S. ROBBINS,
Counsel for Appellants.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

REPLY BRIEF.

The present suit is just such a suit as we understood Mr. Justice Brandeis to suggest. It is a suit by members of the Board of Trade against the board and its directors, to enjoin them—

> "From admitting to membership in said Board of Trade any representative of any co-operative association of producers * * * or from taking any

> other steps for the purpose or with the intent to com
> ply with said act" (Rec., p. 15).

The Solicitor General appeared concerned lest appellant should jump from the frying pan into the fire. We do no share in this apprehension. It arose out of that provisio of the act—Section 11—that the invalidity of a part shal not annul the whole act. This, we apprehend, must b applied so as not to defeat the clear purpose of the act, whic is—as was emphasized by the attitude of the Secretary o Agriculture on the motion for a stay—that contracts fo future delivery on the boards of trade like the Chicago Boar of Trade should not be taxed.

Furthermore, the result feared will not follow from a strict application of Section 11.

Appellants seek either an annulment of the tax, or an annulment of the regulatory features of the act enumerated on pages 31 and 32 of appellants' brief. If the act is annuled, the regulatory features might remain a statute without a penalty, and in no way troublesome.

If the regulatory features of the act are annulled as having no relation to the collection of the tax, and nothing more, then the rest of the act would remain, including Section 5-*a*, as follows:

> "(*a*) When located at a terminal market upon which cash grain is sold in sufficient volume and under such conditions as fairly to reflect the general value of the grain and the difference in value between the various grades of grain, and having recognized official weighing and inspection service."

The Chicago Board of Trade meets this requirement. The duty would rest upon the Secretary of Agriculture to

designate it as a contract market, and thereby all its members would be freed from tax; and the contingency suggested by the Solicitor General, that the members of this exchange would be subject to the tax is not warranted.

The Solicitor General also contended that that part of the bill which sought to enjoin the internal revenue officials from the collection of the tax violated Revised Statutes, Section 3224, which prohibits suits to enjoin the collection of taxes.

That section is not of universal application; it has its exceptions.

Pacific Whaling Co. *vs.* U. S., 187 U. S., 449-452.
Dodge *vs.* Osgood, 240 U. S., 118-122.

Section 3224 is to be considered with reference to the purpose of its enactment. This was to avoid having the revenue of the Government tied up by injunction suits, a remedy being provided by statute, through a suit by the taxpayer to recover after he has paid his tax under protest. But appellants cannot test the constitutionality of this Future Trading Act by paying the tax under protest and then suing to recover; for unless restrained, the Board of Trade, under the compulsion of this Future Trading Act will accept designation as a "contract market," and as soon as it does so, the contracts for future delivery of these appellants will be exempt from the tax imposed by the act. They could not then pay because the Collector of Internal Revenue would not accept from them any tax; nor could they claim to have paid under protest, if they paid a tax not exacted from them.

Again, the purpose of Section 3224 is to prevent the withholding of the tax when due and the consequent embarrassment to the Government from a delayed revenue. But the

Government will never get one dollar from this twenty cents per bushel tax imposed upon future trading. With wheat now selling in the market $1.00 a bushel, and corn 46 cents a bushel, and oats 31 cents a bushel (Rec., p. —) no person can afford to make, and pay the tax upon, a single contract for future delivery of grain. The tax is, and is not intended to be, a prohibitive one, and will never produce one dollar of revenue; hence the reason for Section 3224 here fails. The other statutory remedy is not available to these appellants and they have no remedy except by bill and injunction.

The Solicitor General also contended that the provisions of the act requiring *members* of the exchange to make and keep memorandum *of their future sales*—Section 4 of the act—and also requiring (Section 5*b*) the Board of Trade to provide for the making and filing by it or its members of reports and records of their "cash transactions," or "transactions for future delivery," must be regarded as in aid of the collection of the tax on puts and calls.

It is difficult to assent to this view. The act treats puts and calls as distinct from cash transactions, or transactions for future delivery. It does not require those engaged in the business of making puts and calls to make any memorandum. Congress might undoubtedly require such traders to make memorandum of their puts and calls, as it does those making contracts for future delivery, and such memorandum respecting such puts and calls would undoubtedly aid in the collection of the tax. But how can there be provisions for memoranda respecting cash or future transactions for any such relation? The memoranda of future transactions and cash transactions are entirely different from such memoranda as are made of puts and calls.

Furthermore, only those who are engaged in the business of making, or make, puts and calls, could be required by a taxing statute to keep memoranda. Many members of the board make no puts and calls, but are engaged solely in either cash transactions or contracts for future delivery, or both. How, then, can a tax imposed upon puts and calls be aided by giving the tax collectors access to the memoranda by traders who make no puts and calls, but confine their transactions to their cash sales or future transactions, or both of them? The fact that this act has required no memorandum to be kept of transactions known as puts and calls shows that Congress thought such tax could be collected without the keeping of or access to any document.

The Solicitor General also said that the Board of Trade could go on under the burden imposed on its members by the tax. If it was here meant that members of the exchange could confine their trading to cash transactions, that is true. But if it was meant that the exchange could continue its future trading with the 20 cents a bushel tax on the future sales of members, it is not true, as was perfectly manifest by the petition of the Secretary of Agriculture presented to this Court to have modified the stay order, in order that future trading on the Chicago Board of Trade might not be stopped.

The case was argued by the Solicitor General on the theory that the regulatory features of the act were only related to the exchange itself, while Section 4 of the act expressly requires of *members* the making of memoranda which, in itself, would justify a suit by members to escape this illegal burden.

It was also suggested from the bench that, in view of recent tariff legislation, nothing short of a tax of 35 cents a bushel

on wheat could be regarded by the court as prohibitive. This overlooks the fact that this 20 cents a bushel tax is imposed not only on wheat, but on all other grains. And the bill alleges (Rec., p. 12) that up to the late war corn had never sold higher than $1.00 a bushel, and was at present selling for 46 cents a bushel; and that oats had never sold higher than 62 cents a bushel, and at present were selling at 31 cents a bushel. Here again the petition of the Secretary of Agriculture to this Court to modify the stay order emphasizes the fact that a 20 cents a bushel tax is a prohibitive one.

The Solicitor General quoted from the speech of Senator Capper, of Kansas. A perusal of that speech will make it perfectly obvious that the purpose of the act was to regulate, and not to tax. But we had not supposed that the speech of a Senator or Congressman in support of, or in opposition to, a bill which becomes a statute could be referred to, even to interpret the act, and much less to aid this Court in determining the power of Congress to enact it.

Those who were members of this Court in 1903 heard from Mr. Christy's counsel, in the case of Board of Trade *vs.* Christy, 198 U. S., 236, the same denunciatory arguments against this exchange.

They contended that the volume of future trading on this exchange was so many times in excess of the actual deliveries as to stamp it all as gambling, and a large volume of evidence was introduced by Mr. Christy's counsel in support of that contention. But this Court, speaking through Mr. Justice Holmes, and after consideration of the evidence, rejected this contention and pointed out clearly the economic value of this future trading. They who thus rail against exchanges fall into the error of thinking that the natural law of supply

and demand does not operate in this future trading. But it is difficult to see how all this has any bearing on the question of the power of Congress to enact this statute. Much more might be truthfully said in denunciation of pool-selling, lotteries, etc., but that has not been regarded as sufficient to deprive the States of their reserved power to regulate such things.

The Solicitor General bases his argument largely upon the right of Congress, in the exercise of its taxing power, to classify objects for the purposes of taxation. This right undoubtedly resides in Congress, which may undoubtedly tax sales on exchanges and leave sales elsewhere untaxed, or *vice versa*. But the right to classify is merely the right to select between different classes of *existing* objects; it does not include the power to create a class, either to tax or to exempt from taxation. As said in the License Tax Cases, 5 Wallace, 462, the power of Congress to tax "reaches only existing subjects. Congress cannot authorize a trade or business within a State in order to tax it."

The Solicitor General also contended that the appellants, who were merely members of an exchange, could not complain here if the governing officers of the exchange desired to qualify as a contract market. But this contention is answered on pages 29 and 30 of appellant's original brief.

Respectfully submitted,

HENRY S. ROBBINS,
Counsel for Appellants.

January 12, 1922.